81-2288

NO. _____

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

PHILIP J. SPECKTER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS

FOR THE

FIFTH CIRCUIT

ROGER S. HANSON, ESQ.
518 South Broadway
Santa Ana, California
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Attorney for Petitioner
PHILIP J. SPECKTER
Member of the Bar
United States Supreme
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Pursuant to Rule 31, Petitioner asserts:

(a) The questions presented for review are:

(1) Whether a U.S. prosecutor can illegally and perjuriously state as fact to a Federal trial jury in his closing argument that a key defense witness is a "liar" because that defense witness wilfully testified under oath that an immunity offer, or "deal" had been given to him, when in fact it had not, and whether reversal of the conviction under the rules of Mooney v. Holohan, 294 U.S. 103, Giglio v. United States, 405 U.S. 105, and United States v. Agurs, 427 U.S. 97 is required in view of the wilful falsified argument presented by that U.S. prosecutor to the jury trying Petitioner Speckter?

(2) Whether governmental prosecutorial misconduct and falsification/suppression of evidence and false jury argument requires reversal under/with the supervisory power and role of the Courts of Appeals, or under the

Due Process Clause of the 5th Amendment?

(3) Within the meaning of Mesarosh v. United States, 352 U.S. 1, 1 L.Ed. 2d 1, 77 S.Ct. 1, did the government present negligibly, but clearly demonstrably key, false evidence by rebuttal witness George Hardin?

(b) The parties to the proceeding in the U.S. 5th Circuit included in addition to Petitioner Philip J. Speckter and respondent United States of America, co-defendant and appellant John Behrens. It is not known whether Mr. Behrens will seek a separate review of his affirmance of conviction or not by Certiorari but this petition is filed solely on behalf of Philip J. Speckter.

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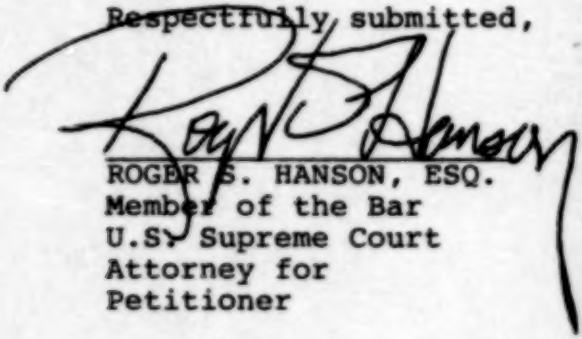
TO THE HONORABLE WARREN E. BURGER, CHIEF JUSTICE OF THE UNITED STATES, AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

Philip J. Speckter, Petitioner herein, seeks the Grant of Certiorari to review the decision of the United States Court of Appeals for the 5th Circuit entered March 18, 1982 affirming his conviction of violations of 18 U.S.C. 371, 471, 472 and 473, involving counterfeiting of U.S. Federal Reserve Notes of $100 denomination suffered in the Northern

District of Texas.

Dated this 10th day of June, 1982 at Santa Ana, Central District of California 92701.

Respectfully submitted,



ROGER S. HANSON, ESQ.
Member of the Bar
U.S. Supreme Court
Attorney for
Petitioner

(d) Official/Unofficial Reports of the U.S. 5th Circuit.

The decision of the U.S. 5th Circuit affirming petitioner's conviction is unreported and was issued/filed March 18, 1982. It is attached as Exhibit "A" to this petition.

The Order Denying a Rehearing and/or Hearing En Banc was issued April 13, 1982 and is attached as Exhibit "B" to this petition.

(e) Grounds for Jurisdiction.

The jurisdiction of the Federal Courts in this case follows from an indictment brought against petitioner under 18 U.S.C. 371, 471, 472 and 473 in the U.S. District Court, Northern District of Texas. Jurisdiction in this Court follows from 28 U.S.C. 1254(1).

(f) Constitutional Provisions and United States Statutes Involved.

AMENDMENT V

CAPITAL CRIMES;

DOUBLE JEOPARDY;

SELF-INCRIMINATION;

DUE PROCESS;

JUST COMPENSATION FOR PROPERTY

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War of public danger, nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

(g) Concise Statement of the Case.

Petitioner Speckter was charged with and convicted of various federal offenses against the counterfeiting laws of the United States in the United States District Court for the Northern District of Texas in Dallas.

Essentially, the case against petitioner, a Fort Worth, Texas printer of many years experience, was formulated by the Government as follows:

1. Robert Campbell was promised lenient treatment by the office of the United States Attorney, and he testified that after prior personal and telephonic entreaties made to petitioner, petitioner agreed to print some $100,000.00 in bogus $100.00 Federal Reserve noted for Campbell for the consideration of some $10,000.00 in genuine money:

2. That Campbell arrived at the print shop, located on the sixth floor of a Fort Worth bank building about 8:00 p.m., and that petitioner instructed Campbell in the "burning" of photographic plates and the assembling of various serial numbers cut from $1.00 bills, and together, they completely

printed the entire batch of money "within four hours" from 8:00 p.m. to midnight;

3. The defense was shown a recorded under-oath statement given by Robert Campbell to the United States Secret Service, where Campbell detailed his role and petitioner's role in the preparation of the money, solidifying the government's allegation that the entire task was encapsulated within the four hour period from 8:00 p.m. to midnight.;

4. An examination of many thousands of dollars of the currency recovered by the United States Secret Service revealed no printing "offset" between the many hundreds of bogus bills, meaning that sufficient drying times had been allowed between passes through the A.B.Dick "360" offset press so that image "ghosts" of the adjacent bill, yet wet with insufficiently dried ink, did not transfer to the mating bill during the high pressures created by the cutting process performed on the money within that four hour period.

5. United States treasury experts produced as first witnesses in the

trial, testified under oath that at least twenty-four hours of time was necessary between printing runs before stacking the bills and cutting them in the United States Bureau of Printing and Engraving in Washington; that said time was the minimally necessary time even when experts were doing the printing under time-tested and ideal conditions; that, if said minimal time was not allowed, ink "offset" would transfer from one bill to the other because of wetness of the ink, and "ghost images" of the reverse side of one bill would appear on the face side of the mating bill when the paper was stacked to be cut into the individual bills;

6. Based on said expert testimony, Robert Campbell altered, at trial, his sworn testimony given to the United States Secret Service that the job had been completed within four hours, by expanding the job into the early morning hours beyond midnight, finally claiming that it was completed circa 4:00 a.m.;

7. Petitioner testified in his own behalf, admitted Robert Campbell's presence in the print shop on the night that the counterfeiting was allegedly done, but denying that he engaged in counterfeiting that evening. Petitioner asserted that he and Campbell were mutual bettors on the outcome of a basketball game that evening between the University of Alabama and L.S.U., and spent some one and a-half hours, from 8:00 to 9:30 or 10:00 p.m. in periodically calling Las Vegas, Nevada from petitioner's print shop telephone, where a given number would produce instantaneous scores on the game as it progressed. Petitioner's telephone bill verified the presence of these steady and periodic long distance phone calls that evening. Petitioner further asserted that he had devoted his printing shop talent efforts that evening to a rush order for the local bank, whom he routinely printed for on a weekly basis; this was the same bank that owned the building from whence he rented his print shop

premises. Petitioner also said that he and Robert Campbell had gone to a Fort Worth bar for a drink following the conclusion of the basketball game, and upon returning to the bank building, petitioner had to sign in with the guard upon his return; he then entered his vehicle, left an upper level parking garage, drove out of the convoluted helical parking ramp, left the building and drove to his home in suburban Fort Worth, arriving home about 1:30 a.m., where his mother-in-law awaited him, awake watching television, for he had promised his mother-in-law a nice dinner and evening out on the town if he were successful in his bets on the basketball game. The mother-in-law recalled the evening in question by this anticipated social event, and verified under oath petitioner's return to the home at 1:30 a.m. Of course, her testimony was subject to bias allegations because petitioner was her son-in-law, whom she might be willing to help circumvent his current Federal charges by perjury;

8. However, Secret Service research into the evening in question developed the lead for the government that a local Fort Worth restaurant operator, Tim Sullivan, was present that evening in the print shop from 5:00 p.m. until midnight, using an adding machine/calculator, computing his Federal Income Tax. The physical layout of the print shop was sufficiently small that Sullivan could see and hear all of the activity engaged in by petitioner and Robert Campbell. The United States summoned him before a Fort Worth Grand Jury then seeking the indictment of Robert Campbell and petitioner Speckter and interrogated him under oath about any alleged counterfeiting then occurring in the print shop. Sullivan testified under oath that he neither saw nor heard any evidence of counterfeiting during the entire period between 5:00 p.m. and midnight, and that Campbell and petitioner had left circa shortly before midnight to secure a drink at the bar; he, Sullivan, then left, locking the door at

midnight. Devastated by this testimony at the Grand Jury, the United States Prosecutor formally offered to bind the United States in an immunity offer to Sullivan to get favorable testimony from Sullivan concerning his viewing of the counterfeiting process and possible participation in it, or at least acquiescence in it without reporting it. Sullivan once again denied seeing or hearing any counterfeiting occurring in the small print shop, and the immunity offer was repeated before the Federal Grand Jury to Sullivan, who again asserted to seeing or hearing no evidence or indication of counterfeiting;

9. The government presented a copy of Sullivan's testimony before the Grand Jury to petitioner and his trial counsel, Roger S. Hanson, and Tim Sullivan was called as a defense witness at trial. His testimony tended to exonerate petitioner and make a liar out of Campbell;

10. It is important to note that, unlike Campbell or petitioner, Tim Sullivan was a neutral, non-biased Fort Worth

restaurant operator, who operated his facility on the same floor of the Fort Worth Bank Building, and who knew petitioner as a patron. Neither being a friend of petitioner nor beholden to petitioner, he was a key, percipient witness, not subject to the allegations of bias for or against either the government or the petitioner. He was a key witness whose credibility and testimony exonerating petitioner obviously damaged the government's case. The small and intimate dimensions of the print shop foreclosed the government from asserting that Sullivan could not have seen or heard evidence of the counterfeiting, where bogus bills were being created before his very eyes, and within easy earshot of his body;

11. Sullivan testified before the jury at trial that he, Sullivan, had twice been offered full prosecution immunity by the office of the United States Attorney before the Fort Worth Federal Grand Jury if he would implicate Campbell and petitioner in counter-

feiting, but he did not and could not accept that offer because, in fact, he had witnessed, seen, or heard no evidence of counterfeiting;

12. The prosecutor, Assistant United States Attorney Jay Ethington, conducted no cross-examination of Sullivan at trial whatsoever over the issue of governmental immunity offered to Tim Sullivan at the Grand Jury;

13. However, at closing argument, before the jury, after defense counsel had reviewed before the jury the role of Tim Sullivan being a percipient witness and seeing no counterfeiting on the evening in question, and further being offered immunity by the government to implicate Specter and Campbell in the counterfeiting, and refusing that immunity on two occasions, the Assistant United States Attorney told the jury that it was absolutely false that the government had offered Tim Sullivan immunity; that Tim Sullivan was a liar who had lied to the jury at trial concerning the immunity offer and had lied to the Grand Jury concerning his

seeing or hearing no counterfeiting; that therefore, the credibility of Tim Sullivan, a key defense witness was effectively destroyed by the false and perjured argument to the jury by a responsible official voice of the United States Attorney's office;

14. The United States Attorney thusly presented false and perjured argument to the jury concerning a "deal" offered to a key witness for the defense in order to destroy the credibility of that key defense witness, an express violation of the canons of ethics of the American Bar Association, and he concomitantly presented key false and perjurious "evidence" and "testimony" before the jury in a manner not able to be confronted and cross-examined over in defiance of the Fifth and Sixth Amendments to the United States Constitution. In fact, the behavior of this prosecutor presented the reverse side of the coin of Giglio V. United States, 405 U.S. 150 and DeMarco v. United States, 415 U.S. 449; in Giglio and DeMarco

the government attempted to bolster credibility of key government witnesses by concealing "deals" made to them for leniency; in the case at bar, the government attempted to destroy the credibility of a key defense witness by concealing and perjuriously suppressing a "deal" offered to the defense witness and the government did so via the majesty of the office of the United States Attorney via asserting as true before the jury in oral argument "facts" which were, in fact, perjured and false and which had never been presented during the trial;

15. Petitioner asserts that the standard for Reversible Error must be as stringent as, and as dictacted by this Honorable Court, in Mooney v. Holohan, 294 U.S. 103; Pyle v. Kansas, 317 U.S. 213; Mesarosh v. United States, 352 U.S. 1; Alcorta v. Texas, 355 U.S. 28; Napue v. Illinois, 360 U.S. 264, 269; Brady v. Maryland, 373 U.S. 83, 87; Miller v. Pate, 386 U.S.1; Giglio v. United States, 405 U.S. 150;

De Marco v. United States, 415 U.S. 449; and United States v. Agurs, 427 U.S. 97.

GOVERNMENT REBUTTAL EVIDENCE

16. George Hardin (R.T.A. 2356) was employed by A.B. Dick in sales. Although claiming extensive knowledge of the offset A.B. Dick "360" press, it was clear that he proferred false evidence in the case in the government's efforts to show that the "D" image appearing in reverse at the right end of the reverse of each counterfeit $100 note of the Cleveland Federal Reserve Bank was caused by "ghost offset printing images" left in the press; in fact, the offset printing manner of reproduction absolutely prevented his "explanation" from occurring. He further testifies falsely under oath that the forehead of Benjamin Franklin had not been "screened". R.T.A. 2401, lines 21 - R.T.A. 2405, line 16).

The government used this false testimony to support his further false testimony that

"anyone of 100 printers in the Dallas area could complete the entire counterfeit task under 4 hours." (In support of Campbell's false original story that the task commenced at 8:00 p.m. and was finished by midnight, a figure now generally conceded to be false by government expert printers from Washington.)

The Court is directed to the sketches in Appendix "C" which expose the falsified, key, critical testimony of "expert" George Hardin, a man alleged by the government to be an "expert" printer and "familiar" with the A.B. Dick 360 press.

(i) ARGUMENT

WHERE A UNITED STATES PROSECUTOR DESTROYS THE CREDIBILITY OF A KEY DEFENSE WITNESS BY PERJURED AND/OR FALSE ARGUMENT BY PLACING BEFORE THE JURY NON-EXISTING, NON-INTRODUCED DURING TRIAL PERJURED/FALSE FACTS, THE CONVICTION MUST BE REVERSED ABSENT THE GOVERNMENT SHOWING THAT THERE IS NO POSSIBILITY THAT THE ASSAILED ACT CONTRIBUTED TO THE CONVICTION; THE CRITERIA OF MOONEY V. HOLOHAN, 293 U.S. 104, PYLE V. KANSAS, 317 U.S. 213; UNITED STATES V. MESAROSH, 352 U.S. 1; ALCORTA V. TEXAS, 355 U.S. 28; NAPUE V. ILLINOIS, 360 U.S. 264, 269; BRADY V. MARYLAND,373 U.S. 83, 87; MILLER V. PATE, 386 U.S. 1; GIGLIO V. UNITED STATES, 405 U.S. 105; DeMARCO V. UNITED STATES, 415 U.S. 449; and UNITED STATES V. AGURS,

427 U.S. 97 MUST BE UTILIZED TO EVALUATE THE DELIBERATE ERROR INSTEAD OF THE CRITERIA USED BY THE UNITED STATES 5TH CIRCUIT. UNDER EITHER UNITED STATES CONSTITUTIONAL DUE PROCESS PRINCIPLES OR UNDER THE SUPERVISORY ROLE OF THIS COURT OVER THE LOWER FEDERAL COURTS CERTIORARI MUST BE GRANTED.

A reference to the summary of the case shows that essentially the resolution of the jury regarding petitioners guilt or innocence devolved around a credibility between Robert Campbell admittedly getting lenient treatment promises from the government, and thus biased, and petitioner, also, of course in a position of bias. Scientific evidence presented by government treasury agents and petitioner's own scientific witnesses greatly militated against the counterfeiting being accomplished in one day period because of the necessity of ink-drying time between runs. At least

4, if not 5 separate runs were necessary to provide the several serial number-several different Federal Reserve Notes here on the A. B. Dick 360 press:

(1) One run for the complete green reverse side;

(2) One run for the black area on the front of the bill common to all bills;

(3) One run for the black area unique to each Federal Reserve Bank change on the front of the bill;

(4) One run for the green serial number unique to each bill;

(5) If the common green treasury seal (the adopted green Cleveland Federal Reserve Bank seal) at the right middle of the bill was done as a common green-separate color imprint on each bill, then a totally separate fifth run would be necessary.

Also, between each run the ink must be changed, there being two separate shades of green ink and one black ink; the press must be cleaned to accomodate the ink changes; this cleaning and ink replacement requires time.

Thus, where no indication of "ghost images" or "printing offset" occurs, it is plain that the many runs are separated by several hours each or required drying time.

But assuming a jury is not sophisticated as to be conclusively convinced by scientific facts, and would be convinced by a key neutral, personally present witness, it is then easy to see that Tim Sullivan, the key defense witness perjuriously labelled a "liar" by the U.S. Attorney in his final summation to the jury was a devastating blow to the government; he was a witness the U.S. Prosecutor had to destroy, and apparently the prosecutor could not chance attempting his demise by cross-examination.

The U.S. Prosecutor deliberately omitted

any cross-examination of Sullivan over the grand jury immunity offer; the prosecutor then personally called Sullivan a liar because the prosecutor said that it was a lie that Sullivan had committed in his sworn assertion that he had been offered a "deal" of immunity for his grand jury and trial testimony inculpating petitioner in the counterfeiting scheme.

We assert that where the prosecutorial misconduct consists of falsifying "deals" it makes, or attempts to make, with either government or defense witnesses, the test for reversible error must be the standards summarized in that long line of uninterrupted authority stemming from Mooney v. Holohan, 294 U.S. 103 and extending without deviation to United States v. Agurs, 427 U.S. 97, 103 49 L.Ed. 2d 342, 96 S.Ct. 2392, 2397, where this Honorable Court said:

"The rule of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 arguably applies in three quite different situations. Each involves the discovery, after trial of information which had been known to the prosecution but unknown to the defense.

"In the first situation, typified by Mooney v. Holohan, 294 S.Ct. 340, 79 L.Ed. 791, the undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury. In a series of subsequent cases, the Court has consistently held that a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. It is this line of cases on which the Court of Appeals placed primary reliance. In those cases the Court has applied a strict standard of materiality, not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking function of the trial process. Since this case involves no misconduct, and since there is no reason to question the veracity of any of the prosecution witnesses, the test of materiality followed in the Mooney line of cases is not necessarily applicable to this case.

"The second situation, illustrated by the Brady case itself, is characterized by a pretrial request for specific evidence. In that case defense counsel had requested the extrajudicial statements made by Brady's accomplice, on Boblit. This Court held that the suppression of one of Boblit's statements deprived Brady of due process,

> noting specifically that the statement had been requested and that it was "material". A fair analysis of the holding in Brady indicates that implicit in the requirement of materiality is a concern that the suppressed evidence might have affected the outcome of the trial."

The U.S. 5th Circuit used as a criteria that petitioner had not suffered "substantial prejudice" by the perjured argument of the United States prosecutor, a criteria apparently derived from prosecutorial misconduct not connected with the long line of prosecutorial perjury-suppression of evidence cases cited above.

This Court, however, concluded that the role of the prosecutor representing the government was a lofty one, and set high standards for this Nation's Federal prosecutors; from 295 U.S. 78, 88, 79 L.Ed. 1314, 55 S.Ct. 629, 633 23 find:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

See also, Apendix "C" to this petition on relevant American Bar Association standards; see State of Delaware v. Hughes, _____ A. 3rd _____, _____ Del. _____.

U.S. 5th Circuit cases are split, even

where the prosecutorial misconduct falls below the egregious behavior manifested by this U.S. prosecutor in the Northern District of Texas; see the following summarized herewith:

In a host of decisions, the United States 5th Circuit has lamented the misbehavior of trial level United States prosecutors in going beyond the record to assert as factual in argument things never produced in evidence. United States v. Corona, 551 F.2d 1386 (Fifth Circuit, 1977) (Prosecutor alluded to co-defendants pleading guilty; made remarks to bolster testimony of government witnesses; told jury that he wished responsibility of jury to determine verdict was his; conviction reversed per Goldberg and Tjoflat, CJ, and Waytt, D.J.); United States v. Morris, 568 F.2d 396 (Fifth Circuit, 1978) (personal belief by prosecutor that defendant "had brought" per-jurious testimony before jury; personal belief by prosecutor that defendant was guilty; pro-secutor stated that government officers who

testified "had no interest in the case except upholding the law"; held, no error committed except by last statement and trial Court instructed immediately that jury was to disregard it); United States v. Handly, 591 F.2d 1125 (Fifth Circuit, 1979) (Prosecutor expressed a "belief" on credibility of witnesses immediately countered by Court admonition that jury was to disregard it, and no "prejudice" was therefore demonstrated); United States v. Garza, 608 F.2d 659 (Fifth Circuit, 1979) (prosecutor sought to propound his personal "belief" in credibility of government witnesses; that he, the prosecutor, would not have brought the prosecution if he did not "believe" in the guilt of the defendant; held per Hon. C.J. Goldberg, Reversal.

This Court said at 608 F.2d 666:

> "The prosecutor's comments that we have considered were expressly intended to influence this critical credibility choice; he introduced for the jury's consideration his own personal opinion as to this choice suggested the existence of information beyond that presented at trial to support his witnesses' credibility,

> and sought to use the status and influence of the entire government investigatory apparatus to bolster the believability of his case. It is impossible to imagine this strategy did not have substantial influence on the jury."

The defendant's defense was not insubstantial, and therefore a major issue in the trial became the credibility of government witnesses and defendant and his witnesses; 608 F.2d 659, 661.

In the case at bar, the prosecutor did not attentuate his very pernicious, agregious branding of key, critical witness Tim Sullivan as a "liar" by his "belief" that Sullivan was a liar, but he overtly branded him a liar by stating that it was not true that the government had offered immunity. Thus, the entire majesty of the United States Attorney's office was brought to bear to assert that Sullivan had committed perjury when he denied seeing counterfeiting and denied the immunity offer. Further, in many of the above Fifth Circuit cases, the defense never objected, and thus perhaps "waived" the error on appeal. In other cases, an immediate admonition cured the error.

In the case at bar, no correction was undertaken although both the Court and the Government had full opportunity to correct perjurious assertions by the United States Attorney concerning this key witness. Defense counsel laboriously called the "error" to the attention of the Court.

We assert that more than "substantial prejudice" accrued to appellant for this calculated and deliberate act to brand a key witness as a perjurer, or "liar" destroyed that defense witness, an impermissible act, and an act done in an impermissible way.

In the case at bar, the aggrieved conduct of the prosecutor effectively introduced false, perjured "testimony" into the case by the prosecutor himself that the defense absolutely had no chance to counter except by defense counsel's efforts to get the District Judge to correct it.

There can be no reasonable contention that Tim Sullivan was not offered immunity before the Federal Grand Jury in Fort Worth; we repeat two of those immunity offers drawn from that Grand Jury transcript:

Page 00005, Line 18 to page 0006, line 3:

"I am going to tell Mr. Sullivan that he is not under suspicion for anything, that anything he says will not be used against him.

"I have no evidence that he was involved in anything, other than being a witness there.

"I am going to tell him that even if he admits helping them out there, which I don't have any evidence that he did, but even if he admits to it now, he is not going to be prosecuted for it.

"Now, I am going to make him understand that he is only being sought as a witness and not as a defendant."

Page 00007, line 7 to page 00008, line 1:

"Q. Mr. Sullivan, my name is John Sweeney. I am an Assistant United States Attorney in Fort Worth.

"The Grand Jury at this time is investigating allegations into the counterfeiting of United States federal reserve notes.

"Allegations have been made that this took place on or about February the 6th, 1980 in Fort Worth.

"I want to tell you that, at this point, Mr. Sullivan, that you are not a target of this investigation. Anything that you do testify to will not be used against you. Nothing you say can incriminate you with regard to answering any question that I might ask you.

"If, however, you do furnish a false answer to any question that I ask you, you can be prosecuted for perjury, which is a felony in the Federal system; penalty for which is a five-year term of imprisonment, maximum.

"Do you understand what I have just told you, sir?

"A. Yes, sir."

Page 00021, line 19 to page 0023, line 11:

"Q. In fact, didn't they tell you that you didn't have to be worried about anything if all you had just done was seen some money being printed, if you hadn't possessed it, passed it, counterfeited it, or helped out?

"A. Yeah.

"Q. Did they ever tell you that?

"A. Yes, sir, but as I said before, my brother is an attorney. He has informed me that just because somebody shows you a badge and says, hey, we are going to do this for you or that for you, doesn't necessarily mean that any of that is true.

"Q. All right. If I tell you right now on the record here in the Grand Jury, and everything that I am saying is being taken

down, that in no way could you be prosecuted for telling this Grand Jury under oath what you way that night, if there was any counterfeit money there; would you believe that?

"A. I have been informed by Mr. Manning that the only one that can do that is a federal judge.

"Q. Have you ever heard of a federal judge filing charges on anybody?

"A. I don't know, sir. I am not a lawyer.

"Q. You are telling this Grand Jury that your attorney told you that the only one who could tell you whether or not you could be prosecuted would be a federal judge?

"A. I -- I -- basically, that's the -- that's my understanding.

"Q. You realize that everything you are saying is being taken down?

"A. Yes, sir.

"Q. And everything that I am saying is being taken down?

"A. Yes, sir.

"Q. And a record is being made of it?

"A. Yes, sir.

"Q. And I am telling you, Mr. Sullivan, that I can and do at this time bind the federal government not to prosecute you for any truthful statement you make in

answering any of my questions truthfully, the only -- the only prosecution that could possibly take place against you is if you lie in this Grand Jury under oath.

"A. I understand that.

"Q. You understand that?

"A. Yes, sir."

We next cite Tim Sullivan's trial testimony, which was cleverly not cross-examined by U.S. Attorney Jay Ethington, from R.T.A. page 1914, lines 3-18:

"Q. All right. Now, you testified in front of the Federal Grand Jury in Dallas, is that right?

"A. Yes, sir.

"Q. At that time you testified, they offered you immunity, did they not, from prosecution if you would disclose any information you saw about counterfeiting there?

"A. Yes, sir.

"Q. So you knew when you testified in front of the Grand Jury you would have immunity from the U.S. Government, did you not?

"A. Yes, sir.

"Q. You told them that you never saw any counterfeiting activity going on in the print shop that night, is that correct?

"A. Yes, sir."

It is further necessary to summarize the U.S. prosecutor's false and perjured argument before the trial jury, taken from R.T.A. 2614, line 15 ff:

> "Sullivan. It was stated to you that Sullivan received or was offered immunity. That's simply not true. Sullivan was interviewed by the Secret Service agents. Sullivan admitted to being at the print shop that night. Sullivan said, 'I didn't see anything. I don't know what they were doing. I didn't see anything.' And as soon as Sullivan made those statements to the Secret Service agents, he was locked into that story, that account of it, and he couldn't change it.
>
> "Early, early in the investigation when he as approached, Sullivan locked himself into his own story, and he had to live with it, even in front of you folks. So that's his remembrances. It's unfortunate. I submit to you that he is a liar. And he couldn't help it, because he was locked into it.
>
> "No, those are points that Mr. Hanson made."

It is, of course, true that defense counsel, Roger S. Hanson, gave the U.S. District Court Judge and the Assistant U.S. Attorney ample opportunity to correct the error; immediately upon the prosecutor ceasing his perjured

presentation to the jury, this colloquy occurred;

(From R.T.A. 2624, line 13 ff:)

"THE COURT: Thank you, Mr. Ethington.

"Now that you've heard all the evidence --

"MR. HANSON: Your Honor, May I approach the bench?

"THE COURT: Yes.

"(Jury out)

"Mr. HANSON: Your Honor, I contend that Mr. Ethington has misled the jury on matters that were accorded to Mr. Timothy Sullivan in front of the Grand Jury. I think in four places the Assistant U.S. Attorney Sweeney tells the Grand Jury that he is not going to prosecute him, and the page --

"MR. ETHINGTON: Can we offer it in front of the jury?

"MR. HANSON: I want you to tell the jury that is not true.

"MR. ETHINGTON: I object to talking in a loud voice.

"THE COURT: Both of you reduce your voices. That's it?

"MR. HANSON: Several places --

"THE COURT: Okay. Just go ahead and have a seat and I will take care of it.

"MR. ETHINGTON: Judge, I read that, and the tone of his words and intent of Sweeney are not to immunize that guy but merely to ask whether he knows anything

about it. He never offered to Sullivan immunity.

"MR. HANSON: That's at least tactical immunity.

"MR. ETHINGTON: No.

"THE COURT: I'll resolve it. You go ahead and have a seat, and I'm going to read it without comment.

"MR. ETHINGTON: Judge, that's not evidence. We object to the reading to the jury that --

"MR. HANSON: That was asked of him when he was under oath whether he in fact was promised immunity, and he said he was. And it stuck.

"MR. ETHINGTON: I submit to you he doesn't know what immunity was and Sweeney was trying to explain it to him, period.

"MR. HANSON: I submit to you that mislead this jury.

"MR. ETHINGTON: I only responded to counsel for Defense's comments."

Such governmental maneuvers, suppression of evidence, and deliberate attempts to mislead the jury know no sanction by the U.S. Supreme Court, and a host of decisions so hold requiring this conviction to be reversed, as the credibility of Sullivan was and is clearly a

key issue. Deliberate efforts to mislead a Federal Trial Jury must result in the most severe of sanctions -- outright and full reversal without access or resort to a "harmless error" rule. Mooney v. Holohan, 294 U.S. 102; Pyle v. Kansas, 317 U.S. 213; Mesarosh v. United States, 352 U.S. 1; Alcorta v. Texas, 355 U.S. 28; that the credibility of a witness being affected by the falsification requires reversal is shown by Napue v. Illinois, 360 U.S. 264, 269; suppression of the truth where demand is made to change it requires reversal, Brady v. Maryland, 373 U.S. 83, 86; there can be "no" retreat from this cathartic reversal requirement, Miller v. Pate, 386 U.S. 1; Giglio v. Untied States, 405 U.S. 150; De Marco v. United States, 415 U.S. 449; U.S. v. Agurs, 427 U.S. 97; Imbler v. Craven, 298 F. Supp. 795 (C.D. Calif 1969); In Re Ferguson, 5 Cal. 3rd 525; People v. Ruthford, 14 Cal. 3rd 399; People v. Westmoreland, 58 Cal. App. 3rd 32. Plainly, this

conviction must be reversed.

The government of a strong and free nation needs not to achieve its convictions by deliberate attempts to mislead a Federal Trial Jury. While the U.S. prosecutor can strike honest, hard blows, he cannot strike foul blows; the late Justice Sutherland writing, Berger v. U.S., 295 U.S. 78, 79 L.Ed. 1314 (1935 55 S.Ct. 629, 633 has so decreed.[1]

It is readily apparent that Assistant U.S. Attorney Ethington in closing argument labelled Tim Sullivan "a liar", which amounted to the prosecution expressing, by means of unsworn testimony, its non-presented alleged personal knowledge that Sullivan had lied under oath about the offer of immunity, and appellant Speckter's counsel, Roger S. Hanson, had similarly presented this "lie" as another wilful falsehood in closing argument.

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1. The Dallas office of the U.S. Attorney has these immortal words prominently displayed in a frame it its reception room!!

The Supreme Court of Delaware in a very recent case, Hughes v. State, ____ Del. ____, ____, ____ A.2d ____, ____, said:

> "Hughes argues that the State in rebuttal impermissibly labelled many of his pre-trial, out-of-court statements as "lies" which amounted to the prosecution expressing, by means of unsworn testimony its personal belief that he had lied.
>
> "This aspect of prosecutorial argument is trouble-some because it is not susceptible to clear line-drawing, whether a prosecutorial statement is a legitimate inference or an impermissible personal opinion. Also, Courts of other jurisdictions permit characterizations of "lies", so long as they are based on the evidence. But whatever the rule may be elsewhere, we regard the Delaware law as settled by Sexton just two years ago; we said this:
>
> > "The denomination of [a] defendant's testimony as 'lies' amounted to the testimony of an unsworn witness and a statement by the prosecutor that she was personally convinced of defendant's guilt." 397 A.2d at 544.
>
> "And in Sexton, as we have already said, the Court approved of §5.8(b) of the ABA Standards relating to the Prosecution Function; thus:
>
> > "It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or the guilt of the defendant."

We recognize that the prosecutor 'is allowed and expected to explain all the legitimate inferences of the appellants' guilt that flow from [the] evidence.' Hooks, 416 A.2d at 204, but if the Delaware law means anything, it must preclude a prosecutor from offering, under the circumstances of this case, his own subjective view of a defendant's guilt and a characterization of a defendant's statement or testimony as 'lies'. A witness or a party may be mistaken, uninformed, or erroneous in his facts or conclusions in many ways. And a prosecutor may argue that to the jury when the evidence or a reasonable inference therefrom so suggests. But to label a witness as a 'liar', even when it is tempered by such modifiers as 'the State contends' or 'I suggest', is necessarily to introduce a subjective element to the argument; it is subject in two ways: First, subjective on the part of the witness whose testimony is under attack because a liar is 'a person who tells lies' and to lie is 'to make a statement that one knows is false, esp. with intent to deceive.' Webster's New World Dictionary (1978), and, second, subjective because the prosecutor is making a judgment on the basis of his own conclusion about the testimony.

The Delaware Supreme Court cited with approval the American Bar Association Standards, the Prosecution and Defense Functions; ____ Del. ____, ____, ____ A.2d ____, ____:

"1.1 The Function of the prosecutor.

(a) The office of prosecutor is an agency of the executive branch of

government which is charged with the duty to see that the laws are faithfully executed and enforced in order to maintain the rule of law.

(b) The prosecutor is both an administrator of justice and an advocate; he must exercise sound discretion in the performance of his functions.

(c) The duty of the prosecutor is to seek justice, not merely to convict.

"5.5 Opening statement.

In his opening statement the prosecutor should confine his remarks to evidence he intends to offer which he believes in good faith will be available and admissible and a brief statement of the issues in the case. It is unprofessional conduct to allude to any evidence unless there is a good faith and reasonable basis for believing that such evidence will be tendered and admitted in evidence.

"5.6 Presentation of evidence.

b) It is unprofessional conduct for a prosecutor knowingly and for the purpose of bringing inadmissible matter to the attention of the judge or jury to offer inadmissible evidence, ask legally objectionable questions, or make other impermissible comments or arguments in the presence of the judge or jury.

"5.8 Argument to the jury.

(a) The prosecutor may argue all reasonable inferences from evidence in the record. It is unprofessional conduct

for the prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it may draw.

(b) It is unprofessional conduct for the prosecutor to express his personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.

(c) The prosecutor should not use arguments calculcated to inflame the passions of the jury.

"5.9 Facts outside the record.

It is unprofessional conduct for the prosecutor intentionally to refer outside the record whether at trial or on appeal, unless such facts are matters of common public knowledge based on ordinary human experience or matters of which the court may take judicial notice."

Plainly, Assistant United States Attorney Ethington was guilty of falsifying his argument to the jury and stating facts outside the record as being true and in existence when in fact there were no such facts.

Over forty years ago, Justice Sutherland in Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 644, 79 L.Ed. 1314 (1935) spoke of the duty of a U.S. Prosecutor:

"The United States Attorney is the representative not of an ordinary party

> to a controversy, but of a sovereingty whose obligation to bovern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor -- indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one."

Therefore, this conviction must be reversed for this gross misbehavior. We suggest that Certiorari must be granted to prevent gross governmental trial misconduct from being ignored where it has greatly prejudiced a Federal defendant.

ARGUMENT II

WITHIN THE MEANING OF MESAROSH V. UNITED STATES, 352 U.S. 1, 1 L.Ed. 2d 1, 77 S.Ct. 1, THE GOVERNMENT ON REBUTTAL, VIA WITNESS GEORGE HARDIN, PRESENTED KEY, SUBSTANTIAL REBUTTAL EVIDENCE THAT WAS FALSE; WHETHER IT WAS THE RESULT OF DELIBERATE FALSITY OR NEGLIGENCE MATTERS NOT FOR THE GOVERNMENT CAN NOT OBTAIN A CONVICTION ON KEY, SUBSTANTIAL MATERIAL FALSE EVIDENCE.

It is to be recalled that appellant's defense was inter alia, that insufficient time existed for the production of the money between Campbell's 8:00 p.m. arrival and the sworn testimony of Campbell given to the Secret Service that the entire job was completed by midnight.

In support of this deficient time was the periodic but steady series of telephone calls

made to Las Vegas, Nevada to check on the outcome of the Alabama - L.S.U. basketball game, and the departure circa 11:30 p.m. for a sojourn to a bar for a drink made by Campbell and appellant followed by appellant's 1:00 a.m. re-check in to the building to retrieve his car and return to his Ft. Worth home circa 1:30 - 2:00 a.m., the latter being verified by Lillian Ayres, his mother-in-law.

After Campbell was indoctrinated by Secret Service printing experts who acknowledged the unlikelihood of a job being completed in less than the 4 hour interval from 8:00 p.m. until midnight, Campbell radically altered his trial testimony.

Regretfully, for the government, Secret Service expert Tom Lightsey had testified that a full 24 hour period had to elapse to preclude "ink-offset" occurring between the sheets caused by the still-damp ink during the cutting process of the stacked sheets.

None of the confiscated counterfeit

Federal Reserve Notes demonstrated ink offset, so the government became desperate to overcome their own expert, Lightsey, who testified to the minimal time of 24 hours between each run of a process that had a minimum of 4, if not 5, passes through the A.B. Dick 360 offset press. The government, of course, recognized that significant time had to elapse between each run in order to allow the ink to dry to preclude the ink "offsetting" from one page to the other when simply stacked together, and especially when pressed together by the cutting blade during the physical cutting of the bills.

In an effort to show that a reverse "D" symbol appearing on the mid-right hand side of the reverse of the counterfeit money was caused by "printing offset" the government called one George Hardin, who claimed some 30 years experience with the A.B. Dick "360" offset press. Hardin opined that "any printer in Dallas" could perform the counterfeit job from beginning to end in less than 4 hours and

that the bills did demonstrate "printing offset" because of the aformentioned reverse "D". This was, of course, the government's initial effort to prove by an expert under oath that "printing offset" had occurred, and it served to negate and circumvent appellant's defense that the money could not have been printed in 4 hours, let alone even 3 days, because drying time between runs would have consumed a minimum of 24 hours between each run, or at least some 3 to 4 days.

Hardin gave demonstrably false evidence concerning the "printing offset" of the reversed "D" on the back side of the counterfeit currency. See Appendix "C" for a graphic illustrated proof of the falsification by the government of this key testimony.

Further, the government wished to show that the counterfeit money had <u>not</u> been produced by first "screening" the portrait of Benjamin Franklin on the face of the $100 counterfeit money, for this process is, itself a more time consuming process.

Hardin, under oath, testified falsely that no screening process was used on Franklin's portrait by the counterfeiters, a readily demonstrated falsity; further that genuine bills are produced by "screening", a direct contradiction when one notes that genuine currency is engraved and hence "screening" is not even a relevant term or process.

Appellant sought to counter this false evidence by defense witnesses Clifford Gibbs and M. Teter, but, of course, we cannot truly today tell their effect on the jury, and in view of the conviction, it is readily apparent that the jury believed George Hardin and disbelieved Gibbs and Teter.

This Court must recognize the significance of the absence of "printing offset" on each and every one of the hundreds of captured specimens.

It means that the requisite drying time between press runs was, in fact, allocated in the overall printing process, a period

designated as 24 hours minimal time by Secret Service printing expert Tom Lightsey; thus the entire process likely consumed at least 3 days, and not the highly falsified 4 hours in the purchased government testimony of Robert Campbell. The time consuming screening process truly used by the counterfeiters added significantly to the overall process.

The consequences to this case of this readily demonstrable falsification by the government can not be negated, and its effect on a Federal conviction must be measured by the standards of Mesarosh v. United States, 352 U.S. 1, 9, 1 L.Ed. 2d 1, 77 S.Ct. 1, where the High court siad, inter alia:

> "either this Court or the District Court should accept the statement of the Solicitor General as indicating the unreliability of this Government witness. The question of whether his untruthfulness in these other proceedings constituted perjury or was caused by a psychiatric condition can make no material difference here. Whichever explanation might be found to correct in this regard, Mazzei's credibility has been wholly discredited by the disclosures of the Solicitor General. No other conclusion is possible.

> The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other result than to accord petitioners a new trial.

In view of the demonstrated government falsification, this conviction must be reversed.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-2321

United States of America ,

Plaintiff-Appellee,

versus

PHILLIP JASON SPECKTER and
JOHN EDWARD BEHRENS,

Defendants-Appellants.

Appeals from the United States District Court
Northern District of Texas

(March 18, 1982)

Before WISDOM, RANDALL and TATE, Circuit Judges.

TATE, Circuit Judge:

The defendants Speckter and Behrens were convicted of conspiring to make, utter, and deal in counterfeit currency, 18 U.S.C. §§ 371, 471, 472, and 473, as well as of selling counterfeit currency, 18 U.S.C. § 473. On their appeal, the defendants altogether raise five contentions of error:

1. Both defendants contend that their conspiracy convictions should be reversed because of a prejudicial variance between the single conspiracy for which they were indicted, and the evidence actually introduced that showed (they argue) two or three conspiracies;

2. With regard to his conviction under 18 U.S.C. § 472 (selling counterfeit currency), Behrens contends that there was insufficient evidence to convict him-- that the only evidence relied upon by the government was an extrajudicial admission allegedly made by him to a purported coconspirator, which is a legally insufficient sole basis for a conviction;

3. With regard to his conviction under 18 U.S.C. § 471 (making counterfeit currency), Speckter contends that the evidence does not prove beyond a reasonable doubt that he printed the counterfeit currency in question;

4. Speckter further contends that he was denied a fair trial by the prosecutor's

closing argument that falsely asserted a fact that furthermore was not in evidence;

5. Speckter also contends that he was convicted on the basis of perjured testimony, arguing that a government expert testified to a physical impossibility.

Finding no reversible merit in any contention raised, we affirm the convictions.

1. Single-Multiple Conspiracy

The indictment charged that the defendants along with nine[1/] other defendants had conspired to violate federal criminal statutes with regard to making, uttering, and dealing in counterfeit currency. The indictment alleged that one or more of the defendants would utilize an offset printing press in Fort Worth, Texas, to print counterfeit one-hundred dollar notes, that one or more of them would purchase the counterfeit currency and transport it to the Dallas and Irving, Texas area and to other areas of the United States, and that one or more of the defendants would preset as genuine the counterfeit notes in the

Dallas and Fort Worth areas of Texas, in New Orleans, in Los Angeles, in Mobile, Ala., in Tampa, Fla., and in other areas of the United States.

1/ Prior to trial five of the coconspirator defendants pleaded guilty. The two appellant defendants went to trial with four other alleged conspirators. Of these, two were convicted and two were acquitted.

The evidence accepted by the jury, in substantial part supplied by Robert Campbell, a key witness of the government, was as follows:

Campbell, the originator of the conspiracy, had proposed to Speckter, a printer in Fort Worth, that they produce $100,000 in counterfeit one-hundred dollar bills. Speckter was to receive $10,000 when the bills were printed, and another $10,000 after they were passed. Speckter ultimately agreed, and Campbell gave Speckter $400 to purchase supplies. About a month later, at Campbell's urging, the appellant defendant Behrens agreed to pay

Speckter the initial $10,000 for the printing of the $100,000 in counterfeit bills. About two months later, Speckter with Campbell's assistance printed the counterfeit currency. After Speckter was paid $7,000 by Behrens and agreed to accept $13,000 from the proceeds of passing the counterfeit currency, Speckter met Campbell and Behrens and gave them the counterfeit one-hundred dollar bills totalling $100,000 in full amount.

The claim of variance arises from the following circumstance: Campbell had proposed to Speckter that the manufacture the counterfeit currency for him and others to buy marijuana and cocaine in Florida and then resell the drugs at a further profit. However, after Campbell and Behrens received the counterfeit money and drove toward Florida with codefendants Romo and Cornstubble, these four fell into disagreement in New Orleans and decided to separate. Campbell gave Behrens $60,000, and he and Romo continued on to Florida to buy drugs. However,

in the ultimate fact, although they passed a number of the notes, they did not buy drugs. Furthermore, according to Campbell, Behrens subsequently told him that he had sold $30,000 of the counterfeit money to some people in Dallas and that at that time (some six weeks after the New Orleans parting) he still had $30,000 left.

The defendants Speckter and Behrens argue that the conspiracy was to make and pass counterfeit money for the purpose of buying drugs; whereas in fact, after the initial agreement, it broke up into sub- or different conspiracies by Behrens (to pass counterfeit bills in the Dallas area) and Campbell (to use some of the money in New Orleans and Dallas and to pass some en route to and in Florida for other purposes than buying drugs). The thrust of Speckter's complaint is that he was prejudiced by the spillover of evidence of these sub- or different conspiracies, of which he was not a part; Behrens' complaint is that he

was prejudiced by the spillover of evidence as to activities in the Campbell conspiracy (after Behrens had withrdawn from it) in acts in Texas, Louisiana, Alabama, and Florida. See Kotteakos v. United States, 328 U.S. 750, 66 S.Ct. 1239, 1243-44 (1946)

We find no merit to this contention. In the first place, as we will later note, the evidence adequately supports proof of a single conspiracy to make, utter, and deal in counterfeit conspiracy, as charged by the indictment. In the second place, even assuming that the disagreement in New Orleans may factually have resulted in the termination of the initial conspiracy and its splitering into the spin-off Behrens and Campbell (sub-) conspiracies, this issue of fact was submitted to the jury under adequate instructions and, by the jury's verdict, was decided adversely to the defendants, on evidence that permitted the jury so to conclude beyond a reasonable doubt. United States v. Ochoa, 609 F.2d 198, 201-203 (5th

Cir. 1980).

With regard to proof of a conspiracy, the government must prove the existence of an agreement between two or more persons to combine efforts for an illegal purpose. United States v. Ochoa, supra, 609 F.2d at 201. A single plan does not become many plans simply because some members were cast in roles more vital than others or because certain members performed only a single function. Id. Proof of overlapping memberships and activities directed toward a common goal are factors that reflect only one conspiracy, while a change in membership does not defeat a finding of a single conspiracy. Id. The government need not always demonstrate an actual agreement among the various conspirators, or even actual knowledge of one another, to establish a single conspiracy; for the interdependent nature of the criminal enterprise may be such that each conspirator had to have realized that it extended beyond his individual

role and that its success depended upon organized efforts of others wider than may be disclosed by his own individual participation. United States v. Sutherland, 656 F.2d 1181, 1190-91 (5th Cir. 1981).

So tested, and viewing the evidence most favorably to the jury verdict as required on appellate review, the evidence adequately shows that both Speckter and Behrens joined in a single conspiracy to manufacture one-hundred dollar bills and to distribute them as genuine by dealings to their profit. They knew its illicit purposes, and each of them had reason to know that the scope of the conspiracy in the distribution at a profit of the counterfeit notes necessarily involved a scope beyond their own individual involvements and necessarily involved the efforts of others. See also: United States v. Barnes, 604 F.2d 121, 143-44 (5th Cir. 1979), cert. denied 446 U.S. 907, 100 S.Ct. 1833 (1980); United States v. James, 528 F.2d 999, 1010-12 (5th

Cir.) cert. denied 429 U.S. 959, 97 S.Ct. 382 (1976).

Here, the conspiracy charged was to make, utter, and deal in counterfeit currency; not to do so for the purpose of dealing in illegal drugs. The essential part to be played by Speckter in the conspiracy was to manufacture the counterfeit one-hundred bills and to receive a total of $20,000 real currency for doing so. The essential parts to be played by Behrens in the conspiracy were to finance the down-payment ($10,000, reduced to $7,000) required by Speckter for delivery of the counterfeit currency, and thereafter to participate in its passing as genuine (as well as to be responsible with Campbell for the remainder of the purchase price due Speckter for the notes).

So far as Speckter was concerned, his participation in the conspiracy had as its objective his securing payment ($20,000) for his manufacture and sale or transfer of one-hundred dollar notes to Campbell and Behrens,

and it was not material to successful accomplishment of the conspiracy whether the counterfeit bills were used to buy illegal drugs instead of being passed for other purposes. Similarly, so far as Behrens was concerned, no material difference in the conspiratorial illegal agreement, financed by him, resulted when Campbell, after leaving him, distributed the counterfeit bills for other purposes than to purchase illegal drugs as initially contemplated. In both instances, the conspiracy essentially contemplated that the false bills would be passed or uttered through intermediaries or associates. The circumstance that the bills were passed by members of the conspiracy for other purposes then the purchase of initial drugs, as initially planned, did not show any material variation changing the nature or purpose of the initial and single conspiracy charged, that is, to manufacture, utter, and deal in counterfeit currency.

2. Sufficiency of Evidence as to Behrens' Conviction of Selling Counterfeit Currency

Behrens was charged with having sold approximately $30,000 in counterfeit currency Lucio Valdez, Richard Pacheco, and Ninenan Pacheco, codefendants at the same trial.[3/]

3/ The Pachecos did not testify. Valdez did testify; the substance of his testimony is that he had innocently received the counterfeit currency from a person other than Behrens.

The government relied on circumstantial evidence to prove this count. Some $24,000 in counterfeit currency was purchased from Richard Pacheco and others by a governmental agent, and the bulk of the remainder had been passed by the Pachecos and their brother-in-law, Valdez. Expert testimony established that all of the counterfeit one-hundred dollar notes had a common origin, with common defects and printed by the same plate.

To prove that Behrens had sold the Pachecos and Valdez their currency, the government relied on the following evidence:

the testimony of Campbell and Romo that Behrens had bought the one-hundred dollar bills from Speckter and had taken $60,000 of them when he separated from Campbell in New Orleans; testimony that Behrens' fingerprints were found on many of the counterfeit bills that the Pachecos sold to the undercover agent; and testimony by Campbell that, after he had been interrogated by the secret service agents about his connection with the counterfeit currency, he and Speckter went to see Behrens to try to get some of the fake one-hundred dollar bills back in order to make a plea bargain with the government, at which time Behrens told them that he had "sold $30,000 of the counterfeit bills to some people in Dallas," Tr. 320. The Pachecos and Valdez lived in the Dallas area, as did Campbell and Behrens.)

Behrens contends that the government's evidence was insufficient because it depended solely upon his alleged extrajudicial

admission, relying upon the legal principle that an uncorroborated extrajudicial confession or admission of an accused is insufficient to support a conviction. Wong Sun v. United States, 371 U.S. 471, 488-90, 83 S. Ct. 407, 418-19 (1963); United States v. Khandjian, 489 F.2d 133, 137-38 (5th Cir. 1974). From what we have stated of the evidence relied upon by the government, it is apparent that corroborating circumstances supported the extrajudicial admission and that there is sufficient proof educed by which the jury could conclude beyond a reasonable doubt that Behrens had sold the counterfeit currency to the Pachecos in whose possession the bulk of it was found.

3. Sufficiency of Evidence as to Speckter's Conviction of Making Counterfeit Currency

Campbell testified that Speckter personally made the counterfeit bills in his presence when Campbell came to his printing shop at 7 or 8 p.m. and worked until 4 or 5

the next morning, taking a break of an hour to go to a bar. After Speckter's arrest the secret service agents searched his print shop with his consent and seized a photograph and negative of the front and back of a one dollar bill that, according to Campbell's testimony, had been used in making the counterfeit one-hundred dollar notes. Speckter's fingerprints were found on the cardboard partitions that separated some $20,000 of counterfeit notes that were recovered. The government also relied upon expert testimony that Speckter could have produced the counterfeit notes on his equipment within the time period to which Campbell testified.

Speckter testified and denied any involvement. He admitted that Campbell was present on the evening in question, but had an innocent explanation for his present. He attempted to demonstrate that it was impossible for him to have manufactured the counterfeit currency in the time stated by Campbell or of the poor quality produced. He also relied upon the

testimony of Tim Sullivan, who was allegedly present during the printing session that evening, as well as upon an expert's (Gibbs) testimony in support of his (Speckter's) testimony as to the technical impossibility, as well as of Speckter's superior ability that could not have resulted in the poor quality of printing at issue.

Clearly, there is sufficient evidence by which a reasonably-minded jury could find Speckter guilty beyond a reasonable doubt of making the counterfeit notes on the evening in question. Ultimately, the issue before the jury was to determine between the credibility of Speckter and Campbell and their opposing versions of the evening at the print shop, as respectively corroborated by opposing expert (and in Speckter's case, lay) testimony. The credibility of these witnesses and the evaluation of the factual import of their testimony is entrusted to the trial jury. Under well accepted principles, the jury's

credibility-choice will not be disturbed on review by an appellate court.

4. Denial of Fair Trial by the Prosecutor's Closing Argument?

The defendant Speckter correctly contends, and the government frankly admits, that in closing argument the prosecutor improperly stated "it just simply was not true" that Sullivan, a Speckter defense witness, had been offered immunity. The prosecutor's argument was in response to Speckter's counsel's closing argument that Sullivan had not implicated Speckter, even though he was offered immunity.

The prosecutor's statement was grossly improper for two reasons: First, Sullivan had testified on direct examination that he had been offered immunity before the grand jury and had rejected it, and the government had not sought in its cross-examination to question this assertion-- if in fact Sullivan's testimony was not true, the prosecutor's contradicting statement was based on circumstances

outside the record. Second, from the grand jury transcript (that the trial judge permitted to be put in the record, although, over the government's demurrer, he would not permit to be read to the jury), it is apparent that the witness Sullivan may have interpreted the offer of the government as one of immunity, the prosecutor's argument under the circumstances, amount to a misrepresentation of a fact not in evidence, which misrepresentation was used to impugn the credibility of the truthfullness of a sworn and uncross-examined statement of the witness.

Ultimately, we determine that the error was harmless since upon examination of the entire record, the erroneous and unjustified prosecutor's comment does not appear to have caused substantial prejudice to the accused. See, e.g., United States v. Garza, 608 F.2d 659, 663 (5th Cir. 1979). United States v. Handley, 591 F.2d 1125, 1132 (5th Cir. 1979).

In the context of the closing arguments,

Speckter's counsel in his 42-page argument relied for the most part upon an attack on Campbell's credibility and the technical impossibility that Speckter could have produced the bills in question. In approximately one page of his argument, he mentioned, as "among some of the other factors that I think are important," the testimony of Tim Sullivan that we was a few short feet from where the counterfeiting operation was allegedly going on and saw nothing and that, despite threatening by the secret service, he refused immunity and testified truthfully. Tr. 2538-39. In the prosecutor's 27-page rebuttal argument, in the eight pages devoted to rebutting the summation by Speckter's counsel, two paragraphs (a little more than half a page) were devoted to Sullivan, which included the two lines to which objection is made: "It was stated to you that Sullivan received and was offered immunity. That's not true. That's just simply not true." Tr. 2614. The remainder of the comments on Sullivan's testimony were

devoted to evidence introduced at the trial and concluded, "So that's his remembrances. It's unfortunate. I submit to you that he is a liar. And he couldn't help it because he was locked into it [the version of the evening he had first told investigating officers]." Tr. 2615

We believe that reversible error would have occurred if indeed Tim Sullivan had been a crucial defense witness.[4/] However, his testimony, Tr. 1890-1928, while helpful to Speckter, was far from determinative. The substance of his testimony is that he was using an adding machine in Speckter's office on the evening that Campbell came in to visit with Speckter, and that he saw nothing of the counterfeiting operation. He corroborated Speckter's testimony about their sporting interests and telephone calls concerning a sporting event, and his testimony would contradict Campbell's testimony that the latter assisted the printing operations that

evening. Sullivan was present in the office until about midnight, leaving shortly after Campbell and Speckter left for a drink. (He testified that when Speckter left, Speckter expected to return. Campbell testified that indeed they did return and completed the printing job at about four or five o'clock the following morning.)

4/ Speckter's counsel requested the court "to clear up the ambiguity," Tr. 2627, resulting from the prosecutor's statement that immunity had not been promised to Sullivan, in the face of his sworn statement that it had been, unquestioned by cross-examination. The district court overruled the request, with the additional statement: "The jury will be instructed." Tr. 2629. At the outset of its instructions, the court cautioned the jury to "(r)emember that the statements, objections and the arguments made by the lawyers are not evidence in the case" and "to consider only the evidence I have admitted in this case. Do not speculate on matters which are not in evidence.

Had the prosecutor's comment been more prejudicial, we doubt that this caution could have cured the error caused by a statement to a matter outside the record and peculiarly within the knowledge of the prosecutor-- a statement that, moreover, even if technically true (since only a court can "grant" immunity, not a prosecutor), amount in context to a misrepresentation purporting to be based on

non-record information that a witness had erroneously testified to as to the fact (mis)stated by the prosecutor. See United States v. Dorr, 636 F.2d 117, 121 (5th Cir. 1981).

However, on the other hand, Sullivan testified that the printing presses were running loud all evening and that he had absolutely no idea what was being printed. He admitted that he had told the grand jury that he did not know whether "they" [Speckter and Campbell] were printing "green cards or obscene literature or counterfeiting or anything." Tr. 1919.

We conclude that no substantial prejudice was caused by the relatively minor impugnment of this witness through the prosecutor's unjustified statement-- made in passing to a collateral and relatively insignificant issue. Although the witness corroborated Speckter's testimony he did not contradict Campbell as to what was being printed on the presses by Speckter and Campbell. Furthermore, as noted in Part 3, supra, there was substantial

evidence of Speckter's guilt. While we cannot condone the prosecutor's impropriety, we do not find that it caused such substantive prejudice as to require reversal.

5. "Perjured" Testimony Introduced by Government?

Speckter finally contends that his conviction of making counterfeit currency should be reversed because it was tainted by the introduction of false and perjured rebuttal testimony by the government. Mesarosh v. United States, 352 U.S. 1, 77 S.Ct. 1 (1956). This contention is made in the following context:

A primary thrust of Speckter's case was that the counterfeit currency could not be produced on his equipment within the time described by Campbell, whether by Campbell's initial statements prior to trial (between 8:00 p.m. and midnight) or by that to which he testified at trial (between 8:00 p.m. and 5:00 a.m. the following morning). Speckter also attempted to prove that he had not returned to do printing work after he and

Campbell had left the office about midnight. Speckter attempted to prove this defense by expert testimony and by law evidence as to the time movements.

In rebuttal, the government called George Hardin, an expert witness versed in use of the A. B. Dick 360 printing press, the type of equipment owned and operated by Speckter. Speckter claims that this testimony was perjured. The substance of Hardin's short testimony on direct examination was that no less than a hundred printers in Dallas could produce within four hours the mediocre type of counterfeit bills on Speckter's A. B. Dick press in the quantity and using the methodology described by Campbell.

With obvious sincerity, Speckter attacks this testimony as deliberately false and perjured. He relies on technical reasons that, he argues, show that it is a physical impossibility to produce the bills at issue on an A. B. Dick 360 machine in the manner and

within the time described by Hardin. As an appendix to his brief, he illustrates that, according to him, "from the kinematics of the counter rotating cylinders, it is impossible to produce a "Ꭻ" in this position by 'printing offset;' it can only be done by the original photographic process."[5/]

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5. The brief continues: "Hardin's false testimony enabled the government to falsely establish the present of 'printing offset' which in turn enabled it to argue that the requisite minimal drying time between runs did the entire job with 4 to 8 hours rather than 3 days as required because of the necessary drying time for a minimum of 4 or 5 passes through the A. B. Dick '360' offset printing press."

Before the trial jury, during his protracted cross-examination of Hardin (Tr. 2261-2318), Speckter's counsel devoted the major portion of it (Tr. 2367-99) to exploit the alleged physical impossibility of having the backwards "Ꭻ" appear on the counterfeit notes through the process described by Hardin. Hardin offered explanations of this phenomena.

The district court also permitted Speckter to introduce testimony of a lithographer and a printer in surrebuttal to refute Hardin's testimony; among other things, they testified that Speckter's A. B. Dick 360 offset press could not be used in the way Hardin had described as to cause the backwards "Ꭻ" symbol.

The jury chose to accept the cross-examined expert's explanation, as well as the other expert evidence upon which the government relied, in rejecting Speckter's defense that it was physically impossible for his equipment to produce the counterfeit notes within the time and in the manner to which Campbell testified. Whatever right Speckter may have in post-conviction proceedings to prove that the Hardin testimony was deliberately false to the knowledge of the government, as an appellate court on direct review of a conviction it appears to us that the issue raised is a resolution of a conflict of expert testimony

and one that we cannot say (with our perhaps insufficient technical knowledge) that the jury resolved incorrectly.

Conclusion

Finding no reversible merit in any of the contentions of error raised, we AFFIRM both convictions.

AFFIRMED.

XXX

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-2321

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PHILLIP JASON SPECKTER
and JOHN EDWARD BEHRENS,

Defendants-Appellants.

- - - - - - - - - - - -

Appeal from the United States Dictrict Court for the Northern District of Texas

- - - - - - - - - - - -

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 03/18/82, 5 Cir., 198_, ____ F.2d ____)

(April 13, 1982)

Before WISDOM, RANDALL and TATE, Circuit Judges.
PER CURIAM:

(✓) Treating the suggestion for rehearing en banc on behalf of Speckter as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

APPENDIX "B"

( ) Treating the suggestion for rehearing en banc on behalf of Speckter as a petition for panel rehearing, the petition for panel rehearing is DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

United States Circuit Judge

TATE

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 80-2321

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

PHILLIP JASON SPECKTER and
JOHN EDWARD BEHRENS,

Defendant-Appellants.

- - - - - -

Appeal from the United States District Court for the Northern District of Texas

- - - - - -

ON PETITION FOR REHEARING
(April 13, 1982)

Before WISDOM, RANDALL and TATE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed on behalf of Behrens in the above entitled and number cause be and the same is herey DENIED.

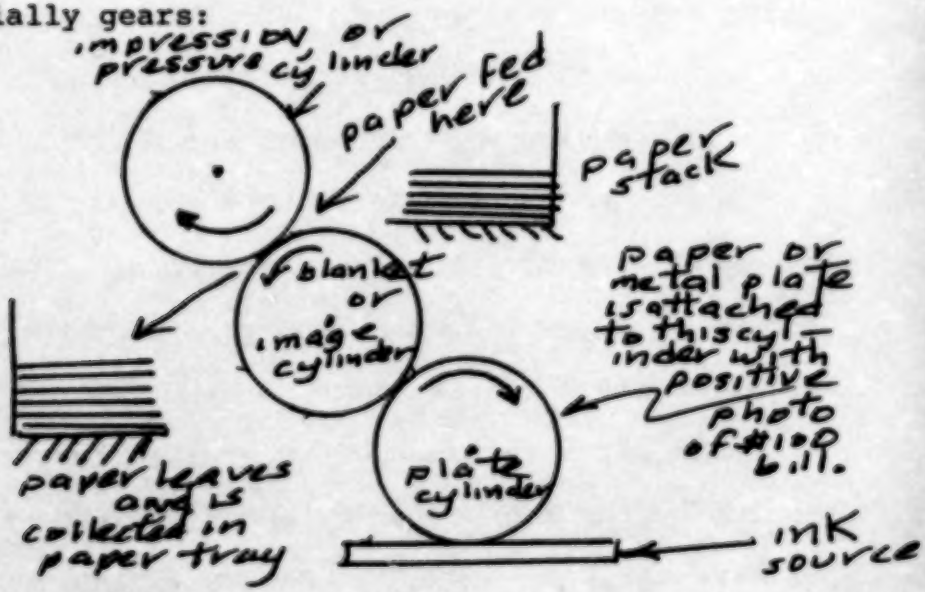
ENTERED FOR THE COURT:

United States Circuit Judge
TATE

APPENDIX "C"

This appendix is offered solely to enable the Court to graphically see that key government witness George Hardin proffered wilfully or negligently false evidence on rebuttal. Mesarosh v. United States, 352 U.S. 1, 1 L.Ed. 2d 1, 77 S.Ct. 1.

It is necessary to understand the A.B. Dick "360" offset press. Schematically, it consists of 3 cylinders which are essentially gears:

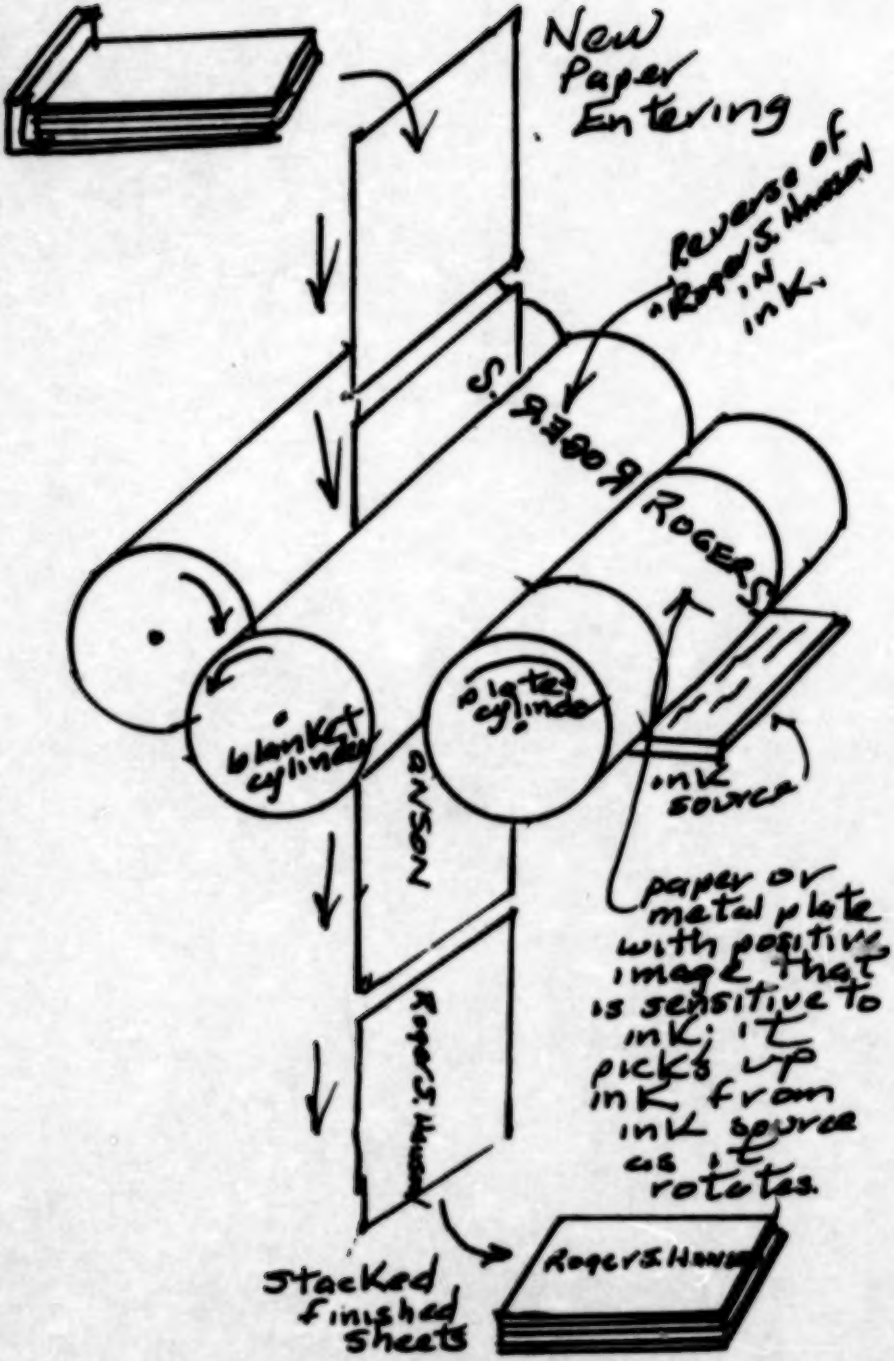


A $100 bill is photographed on a paper plate, leaving a positive image and that paper place is wrapped around the plate cylinder. The positive image is ink-sensitive and it picks up ink which is transferred to a "negative", or "reverse" image on the blanket, or image cylinder. Paper is fed between the imate = blanked cylinder and the impression cylinder which forces image on the fed sheets of paper.

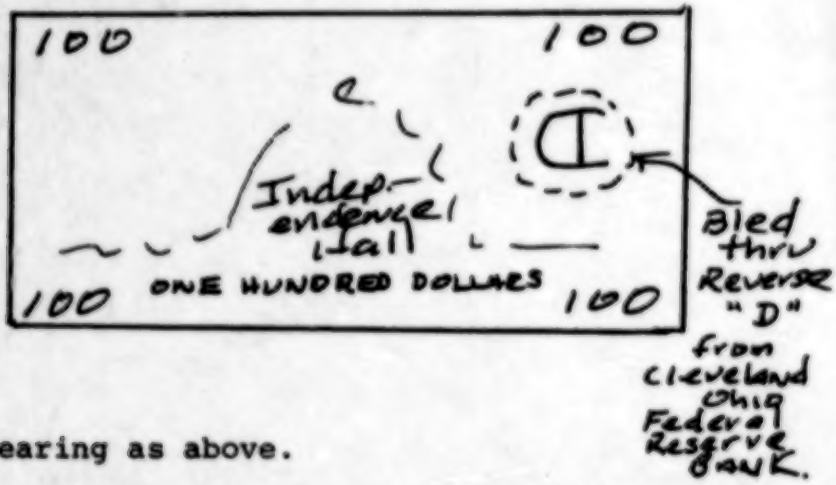
Plainly, if a positive image $100 bill w' ich is ink sensitive is pressed against another surface, it leaves the negative of that image, just the opposite of a rubber stamp.

Thus, "ROGER S. HANSON" would appear on the plate cylinder, but would appear as "NOSNAH .S REGOR " on the image cylinder in ink, like the rubber stamp.

When paper is impinged under the pressure exerted by the impression cylinder, it appears positive again as "ROGER S. HANSON". Thus, cylindrically we have:


New Paper Entering
Reverse of Roger S. Hunter in ink.
S. Roger
Roger S.
blanket cylinder
plate cylinder
ink source
Anson
paper or metal plate with positive image that is sensitive to ink; it picks up ink from ink source as it rotates.
Roger S. Hunter
Stacked finished sheets
Roger S. Hunter

On the reverse side of each counterfeit $100 bill is a clear "bleed through" " ᗡ "



appearing as above.

Never on the front of any bill does a "D" appear in this position; that the " ᗡ" came from the fact that the original Cleveland "D" note was apparently photographed under light and the " ᗡ " was sufficient discernible by the camera, and its "ghost" appeared as a positively placed image just like the bill's full reverse is positively in appearance.

Plainly from the kinematics of the counter rotating cylinders, it is impossible to produce a " ᗡ" in this position by "printing offset"; it can only be done by the

original photographic process.

Hardin's false testimony enabled the government to falsely establish the presence of "printing offset" which in turn enabled it to argue that the requisite minimal drying time between runs had not been honored by the counterfeiters, and they thus did the entire job with 4 to 8 hours rather than 3 days as required because of the necessary drying time for a minimum of 4 or 5 passes through the A.B. Dick "360" offset printing press.

CONCLUSION

In view of each and every one of the foregoing issues, questions and arguments, and in view of the manifest significant errors and depriviations of Federal Due Process of Law, the convictions of the appellant Phillip Jason Speckter must be reversed.

Dated: June 10, 1982 at Santa Ana, California 92701.

Respectfully submitted,

ROGER S. HANSON
Attorney for Phillip J. Speckter
Member of the Bar
U.S. Supreme Court

CERTIFICATE OF SERVICE BY MAIL

I, ROGER S. HANSON, Attorney at Law, am a member of the Bar of the United States Supreme Court; I caused to be deposited in the United States mail at Fort Worth, Texas, a copy of the PETITION FOR CERTIORARI with postage pre-paid addressed as follows:

(40 Copies)
CLERK, U.S. SUPREME COURT
WASHINGTON, D.C. 20543

(3 Copies)
SOLICITOR GENERAL OF UNITED STATES
WASHINGTON, D.C.

HON. JERRY BECHMEYER
UNITED STATES DISTRICT COURT
EARLE CABELL FEDERAL BUILDING
1100 COMMERCE
DALLAS, TEXAS

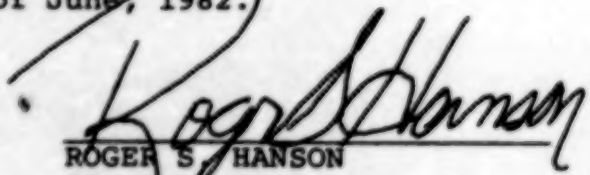
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WASHINGTON, D.C. 20044

I declare this to be true and correct this 11th day of June, 1982.



ROGER S. HANSON
Attorney at Law
MEMBER OF BAR
U.S. SUPREME COURT